

D.S., Appellant

**U.S. POSTAL SERVICE, POST OFFICE,
Monroe, LA, Employer**

Appearances:

Alan J. Shapiro, Esq., for the appellant¹

Office of Solicitor, for the Director

Case Submitted on the Record

Before:

JANICE B. ASKIN, Judge

ALEC J. KOROMILAS, Alternate Judge

VALERIE D. EVANS-HARRELL, Alternate Judge

On July 23, 2018 appellant, through counsel, filed a timely appeal from a June 6, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.³

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that, following the June 6, 2018 decision, OWCP received additional evidence. However, the Board’s *Rules of Procedure* provides: “The Board’s review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal.” 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUES

The issues are: (1) whether OWCP properly determined that appellant received an overpayment of compensation in the amount of \$19,428.98 for the period September 1, 2014 to May 27, 2017, for which he was without fault, because he concurrently received FECA benefits and retirement benefits from the Social Security Administration (SSA) without an appropriate offset; (2) whether OWCP properly denied waiver of recovery of the overpayment; and (3) whether OWCP properly required recovery of the overpayment by deducting \$125.00 every 28 days from appellant's continuing FECA compensation payments.

FACTUAL HISTORY

On April 5, 2011 appellant, then a 59-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging that he developed "foot problems" due to "continuous aggravation of standing and walking" while in the performance of duty. OWCP initially accepted the claim for other congenital anomalies of skin and later expanded the accepted conditions to include bilateral plantar fibromatosis. It placed appellant on the periodic compensation rolls effective August 28, 2011. Appellant returned to work as a modified city carrier effective May 18, 2015.

In a form dated May 15, 2017, SSA advised OWCP that appellant had concurrently received FECA benefits and retirement benefits through the Federal Employees Retirement System (FERS) for the period September 1, 2014 to May 27, 2017. It provided a worksheet that indicated the amount that he received in retirement benefits including the amount earned through FERS and the hypothetical amount that he would have received without FERS. Including the appropriate offset for FERS, it indicated that appellant was entitled to a monthly pay rate of \$960.50 effective September 1, 2014, \$976.80 effective December 1, 2014, \$976.80 effective December 1, 2015, \$979.70 effective December 1, 2016, and \$979.70 effective January 1, 2017. The FERS offset calculation worksheet established that he had received a monthly pay rate of \$1,540.10 effective September 1, 2014, \$1,566.30 effective December 1, 2014, \$1,566.30 effective December 1, 2015, \$1,571.00 effective December 1, 2016, and \$1,573.90 effective January 1, 2017 without the appropriate offset for FERS.

By letter dated June 16, 2017, OWCP notified appellant that it adjusted his FECA compensation benefits to offset the portion of his SSA retirement benefits attributable to federal service as the concurrent receipt of FECA compensation benefits with retirement benefits under FERS is a prohibited dual benefit. It indicated that, effective the pay period beginning May 28 to June 24, 2017, and continuing, he would receive net compensation of \$1,220.51.

On June 20, 2017 OWCP calculated the overpayment by determining the difference between appellant's SSA amount with and without FERS for each period and then multiplying that amount by the number of days in each period. The FERS offset calculation worksheet indicated that OWCP had utilized a 28-day FERS offset amount of \$1,738.80 for the 91 days from September 1 to November 30, 2014, \$7,093.43 for the 365 days from December 1, 2014 to November 30, 2015, \$7,112.87 for the 366 days from December 1, 2015 to November 30, 2016, \$604.30 for the 31 days from December 1 to 31, 2016, and \$2,879.58 for the 147 days from January 1 to May 27, 2017 to find an overpayment of \$19,428.98.

In a preliminary determination dated September 27, 2017, OWCP notified appellant that he had received an overpayment of compensation in the amount of \$19,428.98 because it had failed

to reduce his FECA compensation benefits for the period September 1, 2014 to May 27, 2017 by the portion of his SSA benefits that were attributable to his federal service. It calculated the overpayment amount by determining the difference between his SSA amount with and without FERS for each period. OWCP then multiplied the daily offset amount by the number of days in each period to find a total overpayment of \$19,428.98. It further made a preliminary determination that appellant was without fault in the creation of the overpayment. OWCP requested that he complete the enclosed overpayment recovery questionnaire (Form OWCP-20) and submit supporting financial documentation. Additionally, it notified appellant that, within 30 days of the date of the letter, he could request a telephone conference, a final decision based on the written evidence, or a precoupment hearing.

On October 26, 2017 OWCP received a change of address from appellant. In this letter, appellant also argued that repaying the overpayment would put him and his family in a hardship crisis. He further indicated that he was trying to work part time while disabled.

Appellant submitted an overpayment action request form dated October 23, 2017 indicating his belief that the overpayment occurred through no fault of his own and requested a waiver. He further submitted an overpayment recovery questionnaire (Form OWCP-20) which listed monthly income of \$720.00 for himself and his spouse, \$1,479.00 in SSA benefits, and \$1,610.00 in survivor spousal benefits from Office of Personal Management, for total monthly income of \$3,809.00. Appellant also listed expenses of \$5,383.73, which included in part \$2,054.75 for rent or mortgage, \$750.00 for food, \$200.00 for clothing, \$934.00 for utilities, \$450.99 for other household expenses, and \$993.99 in debts. He noted that he had assets of \$28,325.18, including \$28,300.00 in checking accounts and \$25.18 in savings accounts. Appellant also submitted a number of financial statements and credit card bills in support of his claim.

In two letters dated January 18, 2018, counsel inquired with OWCP as to whether the overpayment could be deducted from a schedule award and requested a reduction in the rate of recovery to \$100.00 every 28 days.

By decision dated June 6, 2018, OWCP finalized the preliminary determination regarding the overpayment of compensation in the amount of \$19,428.98 for the period September 1, 2014 to May 27, 2017, finding that OWCP had failed to offset appellant's FECA compensation payments for the portion of his SSA retirement benefits that were attributable to his federal service. It further found that he was without fault in creating the overpayment, but denied waiver of recovery of the overpayment because his income exceeded his expenses. OWCP calculated that appellant's total income was \$33,382.72⁴ and his expenses totaled \$8,848.28,⁵ which yielded a

⁴ OWCP calculated this amount by adding FECA compensation benefits in the amount of \$1,248.54 to his total monthly income of \$3,809.00 in addition to his total assets of \$28,325.18 for a total income of \$33,382.72.

⁵ OWCP calculated this amount by adding \$2,054.75 for rent/mortgage, \$750.00 for food, \$200.00 for clothing, \$934.00 for bills, \$450.99 for car note, \$993.99 for credit cards, \$1,030.54 for Canvas Cove Home Mortgage first note, \$433.05 for Canvas Cove Home Mortgage second note, \$77.56 for Canvas Cove Home Tax, \$74.00 for Canvas Cove Home Insurance, \$208.18 for Canvas Cove Home Electric Bill, \$66.64 Canvas Cove Home Water/Sewer, \$191.92 Canvas Cove Home Cable/Internet/Home Phone, \$64.05 for Canvas Cove Home Trash, \$99.16 for Canvas Cove Home Cell Phone, \$75.00 for Hartford Circle Home Water/Sewer, \$115.77 for Hartford Circle Home Electricity, \$20.80 for Hartford Circle Home Gas, \$439.60 for Coleman Valley Loop Home Mortgage, \$65.00 for Coleman Valley Loop Home Mortgage Electricity, \$16.00 for Coleman Valley Loop Home Mortgage Water, \$38.12 for Coleman Valley Loop Home Mortgage Internet/Phone, \$99.16 for cell phone, and \$350.00 for auto fuel, for total expenses in the amount of \$8,848.28.

surplus of \$24,534.44. It required recovery by deducting \$125.00 every 28 days from his continuing FECA compensation payments.

LEGAL PRECEDENT -- ISSUE 1

Section 8102 of FECA provides that the United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.⁶ Section 8116 limits the right of an employee to receive compensation. While an employee is receiving compensation, he or she may not receive salary, pay, or remuneration of any type from the United States.⁷

Section 10.421(d) of the implementing regulations requires that OWCP reduce the amount of compensation by the amount of SSA benefits that are attributable to federal service of the employee.⁸ FECA Bulletin No. 97-09 provides that FECA benefits have to be adjusted for the FERS portion of SSA benefits because the portion of the SSA benefit earned as a federal employee is part of the FERS retirement package, and the receipt of FECA benefits and federal retirement concurrently is a prohibited dual benefit.⁹

Section 404.310 of SSA regulations provides that entitlement to SSA compensation begins at 62 years of age.¹⁰ Section 404.409 of SSA regulations provides that for individuals born from 1943 to 1954, full retirement age is 66 years.¹¹

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$19,428.98 for the period September 1, 2014 to May 27, 2017, for which he was without fault. The overpayment was based on the evidence received from SSA on May 15, 2017 regarding benefits paid to him. The record indicates that while appellant was receiving compensation for total disability under FECA he concurrently received SSA age-based retirement benefits that were attributable to federal services during the period September 1, 2014 to May 27, 2017. A claimant cannot receive both compensation for wage-loss and SSA retirement benefits attributable to federal service for the same period.¹²

OWCP calculated the amount of overpayment by determining the difference between the SSA amount with and without FERS for each period and multiplying the daily offset amount by the number of days in each period, to find a total overpayment of \$19,428.98. The record includes an overpayment worksheet explaining the overpayment calculation. Appellant has not contested

⁶ 5 U.S.C. § 8102(a).

⁷ *Id.* at § 8116.

⁸ 20 C.F.R. § 10.421(d); *see S.O.*, Docket No. 18-0254 (issued August 2, 2018); *L.J.*, 59 ECAB 264 (2007).

⁹ FECA Bulletin No. 97-09 (February 3, 1997).

¹⁰ 20 C.F.R. § 404.310.

¹¹ *Id.* at § 404.409.

¹² *See supra* notes 8 and 9.

the amount of the overpayment and no contrary evidence has been provided to show that OWCP's calculations were incorrect. The Board has reviewed OWCP's calculation of benefits received by him for the period September 1, 2014 to May 27, 2017 and finds that an overpayment of compensation in the amount of \$19,428.98 was created.¹³

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of FECA provides that an overpayment of compensation shall be recovered by OWCP unless incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of FECA or would be against equity and good conscience.¹⁴ Section 10.438 of OWCP's regulations provides that the individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by OWCP. This information is needed to determine whether or not recovery of an overpayment would defeat the purpose of FECA or be against equity and good conscience. Failure to submit the requested information within 30 days of the request shall result in denial of waiver.¹⁵

The guidelines for determining whether recovery of an overpayment would defeat the purpose of FECA, or would be against equity and good conscience, are set forth in sections 10.434 to 10.437 of OWCP's regulations.¹⁶

Section 10.436 provides that recovery of an overpayment would defeat the purpose of FECA if recovery would cause hardship because the beneficiary needs substantially all of his or her current income (including compensation benefits) to meet current ordinary and necessary living expenses and, also, if the beneficiary's assets do not exceed a specified amount as determined by OWCP from data provided by the Bureau of Labor Statistics.¹⁷ For waiver under the defeat the purpose of FECA standard, appellant must show that he or she needs substantially all of his or her current income to meet current ordinary and necessary living expenses, and that assets do not exceed the resource base.¹⁸ An individual is deemed to need substantially all of his or her current income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00.¹⁹

OWCP procedures in effect at the time of the March 8, 2018 decision²⁰ provide that the assets must not exceed a resource base of \$4,800.00 for an individual or \$8,000.00 for an individual

¹³ See *S.O.*, *supra* note 8; *G.T.*, Docket No. 15-1314 (issued September 9, 2016).

¹⁴ 5 U.S.C. § 8129.

¹⁵ 20 C.F.R. § 10.438.

¹⁶ *Id.* at §§ 10.434-10.437.

¹⁷ *Id.* at § 10.436.

¹⁸ *Id.*

¹⁹ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6.a(1)(b) (June 2009).

²⁰ The procedures were revised in September 2018.

with a spouse or dependent plus \$960.00 for each additional dependent.²¹ An individual's liquid assets include, but are not limited to cash, the value of stocks, bonds, savings accounts, mutual funds, and certificate of deposits. Nonliquid assets include, but are not limited to, the fair market value of an owner's equity in property such as a camper, boat, second home, and furnishings/supplies.²²

Recovery of an overpayment is also considered to be against equity and good conscience when any individual, in reliance on such payments or on notice that such payments would be made, gives up a valuable right or changes his or her position for the worse.²³ OWCP's procedures provide that, to establish that a valuable right has been relinquished, it must be shown that the right was in fact valuable, that it cannot be regained, and that the action was based chiefly or solely in reliance on the payments or on the notice of payment.²⁴ Donations to charitable causes or gratuitous transfers of funds to other individuals are not considered relinquishments of valuable rights.²⁵ An individual must show that he or she made a decision he or she otherwise would not have made in reliance on the overpaid amount and that this decision resulted in a loss.²⁶

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly denied waiver of recovery of the overpayment.

OWCP found that appellant was not at fault in creating the overpayment of compensation. The overpayment cannot be waived unless recovery would defeat the purpose of FECA or would be against equity and good conscience. In order to establish that repayment of the overpayment would defeat the purpose of FECA, he must show that he requires substantially all of his income to meet current ordinary and necessary living expenses and that his assets do not exceed the resource base as determined by OWCP's procedures.²⁷

The Board finds that appellant's total assets amount to \$28,325.18. Appellant has not established that recovery of the overpayment would defeat the purpose of FECA as OWCP properly found that he did not meet the second prong of this test.²⁸ His \$28,325.18 in assets exceeded the allowable resource base of \$12,700.00 (the sum of \$10,300.00 for him and his wife, plus \$2,400.00 for his two step-children). Because appellant has not met the second prong of the two-prong test for whether recovery of the overpayment would defeat the purpose of FECA, it is

²¹ *Supra* note 19.

²² *Id.*

²³ 20 C.F.R. § 10.437; *see E.H.*, Docket No. 18-1009 (issued January 29, 2019).

²⁴ Federal (FECA) Procedure Manual, *supra* note 19 at Chapter 2.600.b(3) (June 2009).

²⁵ 20 C.F.R. § 10.437(b)(1); *see E.H.*, *supra* note 23.

²⁶ *Id.* at § 10.437(b)(2) (2011); *see M.B.*, Docket No. 18-1101 (issued January 17, 2019).

²⁷ *Supra* note 14.

²⁸ *L.F.*, Docket No. 15-0489 (issued May 11, 2015) (where the Board affirmed an OWCP hearing representative's decision that a claimant was not entitled to waiver of recovery of an overpayment because he and his spouse had over \$17,000.00 in their savings account, and the hearing representative determined that his assets exceeded the specified resource base).

not necessary for OWCP to consider the first prong of the test, *i.e.*, whether his monthly income exceeded his monthly ordinary and necessary expenses by more than \$50.00.

Appellant also has not established that recovery of the overpayment would be against equity and good conscience because he has not shown that he would experience severe financial hardship in attempting to repay the debt or that he relinquished a valuable right or changed his position for the worse in reliance on the payment which created the overpayment.²⁹ He argued that repaying the overpayment would put him and his family in a hardship crisis, but submitted no evidence that he relied upon the incorrect payments to his detriment or that he would experience severe financial hardship attempting to repay the debt. Appellant maintained that he was not at fault in creating the overpayment. However, the fact that an error by OWCP resulted in an overpayment does not by itself relieve a claimant from liability for repayment if the individual also was at fault in accepting the overpayment.³⁰ Because appellant has failed to establish that recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience, he has failed to show that OWCP abused its discretion by refusing to waive the overpayment.

Accordingly, the Board finds that OWCP properly denied waiver of recovery of the overpayment.

LEGAL PRECEDENT -- ISSUE 3

The Board's jurisdiction over recovery of an overpayment is limited to reviewing those cases where OWCP seeks recovery from continuing compensation under FECA.³¹

Section 10.441(a) of the regulations provides that when an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to OWCP the amount of the overpayment as soon as the error is discovered or his or her attention is called to same. If no refund is made, OWCP shall decrease later payments of compensation, taking into account the probable extent of future payments, the rate of compensation, the financial circumstances of the individual, and any other relevant factors, so as to minimize any hardship.³²

ANALYSIS -- ISSUE 3

The Board finds that OWCP properly required recovery of the overpayment of compensation by deducting \$125.00 every 28 days from appellant's continuing compensation payments.

In determining that appellant could repay the overpayment through \$125.00 deductions from continuing compensation payments, OWCP took into account his financial information, as well as factors set forth in 20 C.F.R. § 10.441 and found that this method of recovery would minimize any resulting hardship, not necessarily eliminate it, while at the same time liquidating

²⁹ *Supra* note 17.

³⁰ 20 C.F.R. § 10.435(a); *Lawrence J. Dubuque*, 55 ECAB 667 (2004).

³¹ *See Lorenzo Rodriguez*, 51 ECAB 295 (2000).

³² 20 C.F.R. § 10.441(a).

the debt in a reasonably prompt fashion.³³ Counsel requested a reduction in the rate of recovery to \$100.00 every 28 days; however, the Board finds that OWCP gave due regard to the financial information provided by appellant and noted that appellant's assets exceed the allowable resource base. Therefore, the Board finds that OWCP properly required recovery of the overpayment by deducting \$125.00 from appellant's compensation payments every 28 days.

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$19,428.98 for the period September 1, 2014 to May 27, 2017, for which he was without fault, because he concurrently received FECA and SSA benefits without an appropriate offset. The Board further finds that OWCP properly denied waiver of recovery of the overpayment and properly determined that it would recover the overpayment by deducting \$125.00 every 28 days from his continuing compensation payments.

ORDER

IT IS HEREBY ORDERED THAT the June 6, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 22, 2019
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

³³ See *L.F.*, *supra* note 28.